

DECISION



8106 *K. Laddman*
THE COMPTROLLER GENERAL *P.L.*
OF THE UNITED STATES
WASHINGTON, D.C. 20540

FILE: B-191339

DATE: October 19, 1978

MATTER OF: Motorola, Inc.

DIGEST:

1. Prohibited auction technique did not occur because procurement was effected by delivery order issued against GSA supply contract and was not negotiated. In any event, neither protester's price nor other information was revealed to competitor.
2. Procuring agency is not contractually bound by oral advice to protester that it was low bidder. Binding contract did not arise because written delivery order was not issued as required by protester's GSA contract, and actions by procuring agency indicate no intent to make an award until resolution of another protest on procurement.
3. Where documents submitted by protester to procuring officials did not indicate that there had been a price reduction for an item on Federal Supply Schedule, it was reasonable to evaluate prices and award contract on basis of most current price schedule available and on the basis of price quotations submitted by protester after effective date of reductions in its supply schedule prices.

Motorola, Inc. protests the issuance of a delivery order to RCA by McQuire Air Force Base, New Jersey. The delivery order covered maintenance of non-tactical intrabase radio equipment and it was issued under RCA's Federal Supply Service Contract. Essentially, Motorola contends that its prices for the work were lower and the Air Force therefore is obtaining these services at a higher price than is otherwise available.

Contractor maintenance of non-tactical radio equipment is a recurring requirement for which RCA previously had been the successful contractor. Motorola requested and was provided a copy of the purchase request reflecting the Government's needs. By letter of October 25, 1977, Motorola submitted prices for the Government's

requirements utilizing the prices on its GSA contract and using Motorola equipment prices on comparable non-Motorola equipment. The Air Force deemed it essential that the contractor provide a 12-hour maximum emergency response time. Although RCA's schedule price includes such response time, Motorola's GSA contract provided only a 24-hour response time and further stated that "Premium services for services beyond those hours * * * specified shall be negotiated with the Contractor on an open market basis outside the scope of the contract." Therefore the Air Force requested Motorola to submit a price for such services. By mailgram of December 7, 1977, Motorola indicated its willingness to provide 12-hour response time at no additional charge to the Government.

Price evaluation of RCA based on a 24-hour day, 7-day week coverage for base and repeater stations resulted in the determination that Motorola's price was low. In early January, Motorola was orally informed it had offered the lowest price and would be awarded the contract. On January 24, 1978, a meeting was held with Motorola representatives and Air Force personnel to discuss contractor changeover.

RCA was notified that the Air Force contemplated issuing a delivery order to Motorola for maintenance services for 1978. On January 26, RCA filed a protest with the Air Force. During a meeting with RCA representatives, it became apparent that the Air Force had erroneously evaluated RCA's prices on the basis of service covering a 24-hour day, 7-days per week. As noted above, the Air Force's requirement was for 12-hour emergency response time rather than for continuous (24-hour) maintenance service. This discovery had no effect on Motorola's prices since Motorola offered only one price for either response time. However, RCA's total price for an 8-hour day, 5-day per week type service, including a 12-hour emergency response time during those periods, was lower than its price for continuous coverage. The Air Force then determined that RCA's price was lower than that of Motorola.

Motorola contends that the Air Force engaged in prohibited auction techniques. Apparently, Motorola

believes that its prices or other information were disclosed to RCA, even though the Air Force had informed Motorola that it was the apparent low bidder. Furthermore, Motorola argues that the Air Force attempted to negotiate changes in its GSA contract.

An auction technique usually arises when there has been an improper disclosure of an offeror's identity and/or the contents of a competing proposal during an on-going negotiated procurement. Bunker Ramo Corporation, 56 Comp. Gen. 712 (1977), 77-1 CPD 427. For example, informing an offeror that its price is not low in relation to another offeror constitutes a prohibited auction technique. Defense Acquisition Regulation (DAR) § 3-805.3(c) (1976 ed.). Initially, we point out that in this case the Air Force did not procure by negotiation. A delivery order for services on the GSA Federal Supply Schedule was issued to RCA on the basis that its schedule prices for the work were lowest. DAR §§ 5-105, 5-106 (1976 ed.). In any event, Motorola's prices were not disclosed to RCA; the Air Force states that there was no communication with RCA until approximately January 24. The Air Force states that it did not negotiate with RCA or Motorola. Rather, its inquiry regarding emergency 12 hour response time was necessitated by the terms of Motorola's GSA contract, which as noted above, states " * * * Premium services * * * shall be negotiated * * * outside the scope of the contract." Since the Air Force required a 12-hour emergency response time, the Air Force made the necessary inquiry with Motorola as contemplated by its schedule contract.

Citing our decision in Robert P. Maier, Inc., 55 Comp. Gen. 833 (1976), 76-1 CPD 127, Motorola states that the Air Force's oral advice to Motorola that its prices were low and that it would be awarded the contract constituted a binding commitment by the Government. We disagree.

As a general rule, the intention of the parties determines whether a contract arises before a contemplated writing is executed. Robert P. Maier, Inc., supra. citing Warrior Constructors, Inc. v. International Union of Operating Engineers Local 926, 383

F. 2d 700, 708 (5th Cir. 1967); Corbin, Contracts § 30 (1963); Williston on Contracts, 3rd ed. § 28A. Furthermore, in determining whether a binding commitment exists without a writing, we will focus on whether the actions of the Government would lead a reasonable bidder to believe that such actions were intended for it to act upon without obtaining a written confirmation that it was the intended contractor. See Trataros Painting and Construction Corp., 56 Comp. Gen. 271 (1977), 77-1 CPD 37.

Although Motorola was verbally notified in early January that its prices were low and a meeting was held on January 24 with Air Force personnel to discuss contractor changeover, Motorola recognized by mailgram to the Air Force dated January 30, 1978, that "we have not yet been awarded an order." On January 26, the Air Force posed further questions to Motorola regarding these services and notified it that a decision on the issuance of a written order and a possible start date was being held in abeyance pending disposition of RCA's protest. Moreover, in Robert P. Maier, Inc., supra, our decision relied in part on a solicitation provision which specifically authorized oral acceptance of an offer. Here Motorola's GSA contract states that "Any Delivery Order * * * issued under this Contract shall be issued by the Government in writing * * *." No delivery order was issued by the Air Force. Based on these facts we cannot conclude that the Air Force intended Motorola to commence the desired service prior to receipt of a written delivery order. On the contrary, the Air Force's request of January 26 for answers to its questions, its notice to Motorola of RCA's protest and its refusal to issue a written delivery order, indicated that the Air Force contemplated withholding an award until it could resolve RCA's protest and other questions it had. The January 24 meeting with Motorola was preparatory to a contract award and such actions were discontinued when RCA submitted its protest and the Air Force discovered its error in evaluating RCA's prices. See Trataros Painting and Construction Corp., supra.

Motorola also contends that the Air Force improperly extended RCA's GSA contract which expired September 30, 1977. However, it appears that RCA continued

to perform pursuant to its new GSA contract, effective October 1, 1977, to September 30, 1978.

Finally, Motorola asserts that, in fact, its prices for maintenance services are lower than RCA's. More specifically, Motorola states that the Air Force failed to take into account a reduction in its schedule price for its model "MOCOM 30" radio series.

In this connection, the Air Force's requirements included maintenance for radios designated by Model Nos. D33CMT and X33CMT. In evaluating Motorola's prices, the Air Force used Motorola's price schedule of November 1, 1977, which provided:

"MOCOM 35/30/10 Series	6.00
MOCOM 70 Series	7.00
All Other Mobile Unit Series	8.50
Industrial Dispatcher Series	7.90"

As noted above, Motorola had submitted prices for the Air Force's requirements. For all of the items designated by Model Nos. D33CMT and X33CMT, Motorola's letter indicated a price of \$7.90. Using this information, the Air Force evaluated Motorola's prices and determined that RCA offered the lowest monthly price for its maintenance requirements.

In a letter of December 12, 1977, to the Judge Advocate at McGuire, Motorola advised that "there has been an amendment to our contract maintenance in that all Motorola models of MOCOM 30/35/70 Mobile radios are at \$6.00 each per month rather than the \$7.90 each per month we quoted, seeming to affect 53 radios in your system." Motorola asserts that this letter alerted the Air Force to the price reduction for its "MOCOM 30" radio series. However, the Air Force reports that this letter was never received by the contracting officer and the contracting officer was not aware of the letter at the time of price evaluations. Apparently, this price reduction was transmitted to GSA by

letter of October 10; it was received by GSA on October 21, and approved on October 26. However, as will be discussed infra, we believe that the Air Force did not have sufficient notice of the price reduction, and, therefore, evaluated both RCA's and Motorola's prices on the basis of the information before it.

Where the contracting agency has actual knowledge prior to the issuance of a purchase order or before award of a price reduction which has been offered by letter to GSA, the price reduction must be considered by the agency. B-166819, July 23, 1969; B-148889, August 8, 1962. Although Motorola states that its representative informed the contracting officer of the price reduction, the Air Force unequivocally states that it was not aware of the price reduction referenced in Motorola's December 12 letter. There is no other evidence in the record which shows that procuring officials were aware of this price reduction.

We believe that the Air Force acted reasonably in evaluating Motorola's prices using the November 1 price schedule and Motorola's October 25 letter. The October 25 letter priced all of the items in question at \$7.90 which corresponded to the price listed for "Industrial Dispatchers" on Motorola's price schedule. The December 12 letter, in any event, provided no more information on line item pricing than was available at the time of price evaluation, since it did not reference the October 25 letter and the line items to be changed. In fact as the Air Force reports "there appears to be some confusion since in the 12 December 1977 letter it is stated '* * * all Motorola models of MOCOM/30/35/70 Mobile Radios are at \$6.00 * * *' whereas the November 1977 GSA schedule change lists 'MOCOM 70' series at \$7.00." (The record shows that Motorola erroneously used the 30/35/70 designation which should have been 30/35/10, a radio series which is clearly indicated on the November schedule.) Therefore, even if the contracting officer had received the December letter, we cannot say that the documents on hand would have alerted the Air Force to a price reduction for the items now in dispute. Although Motorola now states that the description "CMT" refers

to its "MOCOM 30" series, the Air Force was not aware of this fact at the time of price evaluation, and, therefore, utilized the \$7.90 price submitted by Motorola for all of the items. We agree with the Air Force when it states:

"When radios were not specifically identified in the Motorola price list, the best judgment and previous experience of the contracting officer and the technical representatives of the requiring activities were used. Any failure to properly identify radio names to model numbers for pricing out the requirement was not due to using out of date pricing * * * but rather was the result of not being properly informed by Motorola."

Moreover, Motorola advises that its October 25 letter contained an erroneous price for the disputed items. The \$7.90 price quoted by Motorola for these items is, in fact, the correct price for "Industrial Dispatchers." However, we were informed that not only was the Motorola representative who submitted this letter unaware of the October price reduction for "MOCOM 30" radios but that he also erroneously priced these items as "Industrial Dispatchers." As noted above, it is now Motorola's contention that these items are "MOCOM 30" radios. Because the \$7.90 price for all of the disputed items appeared as the price for "Industrial Dispatchers" in the November price schedule, and because the Air Force was not aware of the fact that its requirements in this regard corresponded to the "MOCOM 30" series, the Air Force was unaware of any error in pricing.

Normally, it is the bidder's responsibility to submit correct prices. Anabolic, Inc., B-190342, January 26, 1978, 78-1 CPD 69. The Air Force was not aware that Motorola had made a mistake in submitting a price for these items and we believe Motorola should bear the consequences of its error.

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We note that McQuire Air Force Base intends to formally advertise for its 1979 requirements for non-tactical radio maintenance. We believe that this course of action will avoid the problems and confusion which accompanied the award of the instant delivery order, and ensure that full and free competition is achieved.

The protest is denied.

R. J. K. 11m.
Deputy Comptroller General
of the United States